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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIANNE LISA DRAKE,

Defendant and Appellant.

E047268

(Super.Ct.Nos. FMB006578 &
FMB007620)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bert L. Swift,
Judge. Reversed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck,
Donald W. Ostertag and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff
and Respondent.

Defendant and appellant Marianne Lisa Drake contends she received ineffective assistance of counsel when defense counsel did not object to the trial court's reliance on circumstances surrounding her probation violation to impose an upper-term sentence. We reverse with instructions to conduct another sentencing hearing.

BACKGROUND

On May 4, 2004, defendant pled no contest in case No. FMB006578 to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and driving under the influence (Veh. Code, § 23152, subd. (a)). Her plea acknowledged a sentencing range of up to three years, but the plea agreement provided for probation and 90 days in jail to be served on weekends. The probation report prepared for the June 16, 2004 sentencing hearing did not state any factors in aggravation. On June 16, 2004, defendant was sentenced to jail and probation in accordance with her plea agreement.

On June 22, 2005, defendant pled guilty in case No. FMB007620 to possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and requested probation for substance abuse treatment pursuant to Penal Code section 1210 et seq. On the same day, defendant also admitted she had violated her probation terms in case No. FMB006578. The trial court revoked her probation, and then reinstated it with the jail time increased to 180 days.

On August 12, 2005, defendant was sentenced in case No. FMB007620 pursuant to Penal Code section 1210.1 and placed on probation. The probation report prepared for the sentencing hearing listed no mitigating factors and stated that, in aggravation,

defendant was on probation when the offense was committed and that defendant's prior performance on probation was unsatisfactory.

On September 29, 2005, defendant admitted multiple probation violation allegations in case No. FMB007620, and the trial court found that she had violated the drug treatment program for the first time.

On October 20, 2005, defendant failed to appear at a hearing and her probation in case No. FMB007620 was revoked. On November 3, 2005, probation was reinstated.

On December 1, 2005, defendant again admitted multiple probation violation allegations in case No. FMB007620, and the trial court found that she had violated the drug treatment program for the second time.

On February 16, 2006, following additional allegations of violating probation in both cases, defendant was given additional jail time in case No. FSB007620, but continued on probation.

On May 11, 2006, probation in both cases was extended to May 11, 2009.

On December 8, 2008, following another violation of her probation terms, defendant's probation was permanently revoked and she was sentenced. Defendant argued for reinstatement of probation, but if the court did not reinstate, "the original probation report in [case No. FMB00]6578 showed that the mitigating factors outweighed the aggravating factors. In fact, there were no aggravating factors listed in that probation report. [¶] Accordingly, any state prison sentence imposed in that matter should be for a matter of 16 months, not the mid-term of two years and certainly not for

the aggravated term of three years. There simply isn't aggravating factors under the rules of court or statutory aggravating factors justifying it."

The prosecution argued that "all people coming into the program are advised not once, but more than once when they come into drug court, the down side that they are risking in exchange for the upside of what drug court has to offer, they're going to get the aggravated term. And while back at the point of the initial PSI, whatever suggestion was put into place at that time is hardly applicable now in that throughout the past period of close to three years [defendant] has unfortunately performed very poorly on probation, and that alone is a fact the Court may consider in imposing after sentence."

The court ruled by stating, "The Court will note that in both of these cases [defendant] violated—she lapsed on December 24, 2007[,] while on probation. On November 11th she failed to test. When she was called in January 2nd, 2008, a diluted sample of urine, which as far as the Court is concerned, that is an issue of credibility and v[e]racity and honesty. On January 31st, tested positive for methamphetamine and spent sufficient amount of time, [defendant], to know you have to keep up with all of the rules. [¶] In this case you knew you couldn't associate with a felon and you did so, and that's why you're here. So the Court's going to find there [are] sufficient aggravating circumstances in both cases to give you the upper term as well as the understanding that that's what you would get should you violate out of drug court. [¶] Probation which has been revoked is now permanently revoked and [defendant] is sentenced as follows: [case No.] FMB006578, Count No. 1, possession of a controlled substance, violation of Health and Safety Code [section] 11377[,] sub[division] (a) for

the aggravated term of three years. [Case No.] FMB007620, Count No. 1, to be consecutive to the controlled substance Health and Safety Code section 11377, a felony, term of eight months. Total commitment is for three years, eight months with a credit for time served in [case No.] FMB006578, the matter of 456 actual days plus good conduct. [Case No.] FMB007620, matter of 376 days plus no credit for 4019 credits. For a period of time—period of parole to be followed by a term of three to four years. [¶] Count No. 3 in [c]ase No. FMB006578, violation of Vehicle Code section 23152[,], sub[division] (a), misdemeanor, probation is revoked. Judgment is now heretofore pronounced for 365 days with credit for time served of 365 days total.”

DISCUSSION

Defendant contends her counsel rendered ineffective assistance by failing to object to the use of the circumstances of her probation violation as aggravating factors. Defendant’s trial counsel pointed out that the probation report from defendant’s first sentencing hearing June 16, 2004, did not contain any factors in aggravation, and therefore “there . . . isn’t aggravating factors under the rules of court or statutory aggravating factors.” After the trial court expressly relied on recent probation violations as aggravating factors, defendant’s trial counsel did not formally object or repeat his argument. Because defendant’s trial counsel raised the substantive issue behind her appeal, we will address the merits of that contention directly. (See *People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5 [where preservation of issue is “close and difficult” it is assumed the right to appeal has been preserved].) Accordingly, we evaluate whether

the trial court impermissibly considered recent probation violations as aggravating factors.

California Rules of Court, rule 4.435(b), provides that, “On revocation and termination of probation under section 1203.2, when the sentencing judge determines that the defendant will be committed to prison: [¶] (1) If the imposition of sentence was previously suspended, the judge must impose judgment and sentence after considering any findings previously made and hearing and determining the matters enumerated in rule 4.433(c). [¶] The length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term . . .” A later sentence upon revocation of reinstated probation “may take into account events occurring between the original grant and the reinstatement.” (*People v. Harris* (1990) 226 Cal.App.3d 141, 147.)

The trial court noted four violations, resulting in sanctions that were stated in the probation report prepared for the December 8, 2008 hearing. The court also noted the pending violation from defendant’s association with a felon. These events occurred from December 5, 2007, onwards. Defendant’s last reinstatement of probation in case No. FMB006578 was June 22, 2005, and in case No. FMB007620 it was November 3, 2005. Accordingly, the trial court erred in relying on more recent events as factors in aggravation.

The People argue the trial court’s statement was merely indicative of why the hearing was being held, and not the actual basis for the court’s finding of sufficient aggravating circumstances. The People further argue that defendant agreed to the

aggravated term and the agreement was the basis for the aggravated term because of the trial court's statement that "there is sufficient aggravating circumstances in both cases to give you the upper term as well as the understanding that that's what you would get should you violate out of drug court." While the trial court's statement indicates the trial court may have been convinced by the People's argument that such an agreement existed, the record does not support the existence of such an agreement. Indeed, the very plea agreement cited by the People to support their argument merely acknowledges the sentencing range, and does not indicate any actual agreement that the upper term should be imposed. Accordingly, even if the People were correct in their interpretation of the trial court's statement, reversal would still be required because the record does not support any agreement by the defendant that she should receive the upper term.

Lastly, the People also contend that because of the recodification of Penal Code section 1170, the trial court "had discretion to impose any sentence it deemed fit, with or without the presence of circumstances in aggravation." However, in conformance with Penal Code section 1170, subdivision (b), the trial court properly stated its reasons for its selected sentence: the numerous probation violations that occurred from December 5, 2007, onwards. The People reiterated their Penal Code section 1170 contention at oral argument and contended that the outcome would have been identical even if the trial court did not consider the numerous post-reinstatement probation violations. While pre-reinstatement violations occurred, because the trial court only recited the recent events, which were outside its scope of consideration, it is not certain

that the trial court would have imposed an aggravated term in the absence of the recent violations.

DISPOSITION

The December 8, 2008, sentence is reversed. The trial court is directed to conduct a new sentencing hearing. Upon remand, the trial court may consider defendant's probation violations and other circumstances through June 22, 2005, in sentencing on case No. FMB006578, and through November 3, 2005, in sentencing on case No. FMB007620.

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RAMIREZ
P. J.

We concur:

GAUT
J.

KING
J.